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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1302

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

GAYLORD CONTAINER CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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HAMMERSMITH-NORTHCOTE CO., MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No.

THE UNITED STATES OF AMERICA,

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the associate Justices, Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment entered March 5, 1945 (motion for rehearing denied March 22, 1945) in the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed a judgment entered by the United States District Court for the Eastern District of Wisconsin in favor of the respondent.

OPINIONS BELOW

The majority opinion of the Circuit Court of Appeals (Circuit Judge William M. Sparks and District Judge Charles G. Briggle) and the minority opinion (Circuit Judge Evan A. Evans) are reported in 148 Fed. (2) 33 (R 637-647). No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered March 5, 1945. Petition for rehearing was duly and seasonably filed with the Circuit Court of Appeals (R 649), which petition for rehearing was denied March 22, 1945 (R 661). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938) (28 U.S.C.A. 347).

The cases believed to sustain jurisdiction are as follows:

Mitchell v. United States, 267 U. S. 341.
Bothwell v. United States, 254 U. S. 231.
United States ex rel T.V.A. v. Powelson, 319 U. S. 266.

SUMMARY STATEMENT

In a condemnation proceeding instituted by the United States under the Second War Powers Act to acquire fee title to an industrial building development of about 670,000 square feet (R 577), including 91.20 acres of land owned by the petitioner, a fund representing the entire value of the petitioner's lands and buildings as agreed between the United States and the petitioner was paid into the Registry of the District Court.

The respondent Gaylord used a portion of the premises (62,420 square feet) as a corrugated container plant under a written lease from petitioner, which lease at the date of taking had 6 years and 8 months to run (R 541). The rental under the lease was $15,000 per annum. The jury awarded Gaylord $111,792, to be paid out of the fund, for the taking by the United States of its entire leasehold.

Gaylord introduced evidence which, though controverted by Eline's witnesses, fixed the enhancement in the rental value of the leasehold for the unexpired term at $32,843.16 (R 92)[1] that is, the excess of fair market rental for 6 years and 8 months above the $15,000 annual rent Gaylord would have to pay under the lease.

As a second item, Gaylord claimed as part of just compensation the reproduction cost of improvements added by Gaylord and the cost of installing machinery ($9,992.60) in the total sum of $27,192.12 (shown in Exhibit 32, R 95, 248, 567-574) received in evidence over the objection of Eline's (R 53, 56, 70, 248) despite a provision in the lease to the effect that all improvements placed on the premises by Gaylord were to become Eline's property and be surrendered on termination of the lease by lapse of time or otherwise (R 541), and despite the fact that no evidence as to the value of the use of these improvements during the balance of the term was offered by Gaylord (R 137, 139, 77).

In addition to the two foregoing elements, Gaylord claimed, as part of just compensation, so-called "ready-to-go" value (R 95). The trial court, over objection of Eline's (R 167, 211, 254) permitted witnesses to testify that, in

[1]-$24,843.16 constituted rent enhancement on the building (R 89) and $8,000 rental value of a parking lot (R 92).

addition to the increase in rental value over the amount of rent reserved, and the reproduction cost of improvements, they attributed to the leasehold an additional "ready-to-go" value. The "ready-to-go" value is based upon what an alleged purchaser of the leasehold (combined with the machinery and business) would be willing to pay for the leasehold combined with the machinery and business in order to go into possession and immediately produce paper containers, thus avoiding all delays incidental to getting the container business operating. The valuation is based upon an estimate of the value of anticipated profits resulting from business to be conducted on the leased premises. The evidence supporting the claim of so-called "ready-to-go" value which was received over objection (R 166-168; 177; 183; 217; 227; 287; 289; 291-293) and which the court refused to strike and allowed to go to the jury (R 240, 294; 326; 332; 531) may be briefly summarized as follows:

HUGH STRANGE, a container manufacturer, unfamiliar with real estate values (R 169) testified that in addition to the $32,843.16 which was the increment in the rental value of the floor space and parking lot, and in addition to the cost of improvements and installation of machinery in the sum of $27,192.12 (shown in Exhibit 32 (R 248, 567-574) this lease had a "ready-to-go" value in the sum of $170,000 (R 161-166.) He stated that he would pay $420,000 for the plant (leasehold machinery, and attached business values) (R 167). He thought he would be capable of making a gross profit of $300,000 from the plant (R 167, 176) and a net profit of $60,000 per year over balance of the term, taxes being 80%. That the plant is worth seven times annual earnings or $420,000 (R 167). From this he deducted $250,000 as representing the value of the machinery; the balance of $170,000 is the third element of lease-

hold value (R 167). His estimate is not based upon Gaylord's operations (R 169), but upon his estimate of the reasonable possibility of operating the plant 16 hours per day at an output of 1500 tons each month (R 168). He admitted that the expectation of the production of profits is the basis of his estimate of plant value (R 177, 183), and that he didn't consider what he would value the leasehold if the business were conducted at a loss (R 183).

MARCUS B. HALL. This witness, likewise a container manufacturer, and unfamiliar with real estate (R 221) testified substantially the same as Strange that in addition to the increase in rental value of the property of $32,843.16, and the improvements of $27,019.12 (211) (shown in Exhibit 32 (R 248, 567-574), the leasehold had an additional value of $150-$180,000 (R 211). This estimate does not include the value of the machinery when removed (R 212). Mr. Hall estimated the plant could produce 1350 tons per month (R 216) and that it could earn $4.00 per ton or a total of $64,800 per year (R 217). He estimated that the value of the balance of the leasehold was six times annual earnings (R 217). In his opinion the plant (leasehold, machinery and equipment) had a value of $388,800 (R 211, 217, 236). From this he took away $202,000 which in his opinion represented the value of the machinery, which left $186,800 (R 218). He also admitted that his opinion represents the "earning capacity" (R 217, 227). His estimate is not based on Gaylord's production but on his own estimate of what could be earned over 80 months (R 217). He admitted that if the business was not making money, the leasehold would have no value (R 236). His opinion is not based on any actual transaction (R 234).

WALTER C. GEORGE. This witness, an employee of Gaylord from St. Louis, and not familiar with real estate

values (R 249) testified that it took about three or four months to install the machinery new and that it took about one year to get the plant up to full operating efficiency (R 245). In addition to increase in rental value of $32,-843.16 and improvements of $27,192.12, the leasehold was enhanced as of July 1, 1942 by about $175,000 (R 254-255). This enhancement, he stated, was due to developing the machinery or eliminating the difficulties in the combined unit (R 256). He placed a value of $202,000 on the machinery at the time it was moved out (R 253). The $175,000 enhancement above mentioned he stated "is a figure that represents expenditures to get this plant going" (R 270) or development expenses. In it are included estimated expenses incurred as follows:

(1) Waste, $3,000 in boxes per month for 12 months	$36,000
(2) Labor, $150,000 payroll per year times 10%	15,000
(3) Factory expense ($1,000 per month for 12 months)	12,000
(4) Fuel, moving material in building	7,000
Total	$70,000

(R 270-271)

The witness estimated that by reason of war conditions the cost of doing the job over again on July 1, 1942 would be 2½ times what had been spent by the company and therefore he multiplied the $70,000 by 2½ (R 274). This multiplier of 2½ is not based on any statistics or price trends (R 285-286). This $70,000 (not taken from books (R 270)) has been charged off as expense in income tax returns and was not treated as a capital investment (R 274). He testified that the $70,000 has to do with the getting of

the new machinery into a coordinated unit and delay and losses in coordinating the plant (R 283). When Gaylord moved out there was no part of that $70,000 left in the property that could be used or appraised (R 283, 285). He stated:

"I am basing it on its value; in value to us." (R 285).

He also stated:

"We are valuing this as a loss to us." (R 285).

George's estimate is not based on any actual transactions (R 287) but upon combined value of leasehold and machinery (R 257), and upon profits to a person who takes over the entire business and can get into the plant and immediately go to work (R 287, 290, 291, 292).

The verdict and judgment were of necessity based in large part upon this testimony, which was allowed to stand and go to the jury, because the jury verdict of $111,792 exceeded Gaylord's only evidence as to increase in rental value and cost of improvements, which totaled about $60,000. The District Judge throughout the entire trial expressed grave doubt as to the validity of the claim for "ready-to-go" value (R 130-133; 162-163; 163-167; 240; 250-253; 328-332; 531). The trial judge though receiving the proof pertaining to "ready-to-go" value, repeatedly stated that the Government did not take the machinery nor the business, and that the same could not be compensated for (R 87, 163; 205; 257; 492; 529).

The District Court held the sale clause (R 561) fixing at $40,000 the amount to be paid to the respondent on sale of the leased property to the inapplicable (R 332, 530). It also held the condemnation clause (R 530) inapplicable. The Circuit Court of Appeals affirmed the judgment, Judge Evans dissenting as to the inapplicability of the sale

clause. The Circuit Court of Appeals apparently held that its decision in the *General Motors Case*, as modified and affirmed by this court, determined that "ready-to-go" value claimed by Gaylord was proper. The Circuit Court of Appeals admitted, however, that the *General Motors Case* was "not completely parallel" (R 645).

QUESTIONS PRESENTED

A. Whether on condemnation by the United States of real estate only (an entire leashold), just compensation includes so-called "ready-to-go" value (over and above the fair market value of the real estate), which so-called "ready-to-go" value is based upon what an alleged purchaser of the interest in real estate combined with the machinery and the business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the machinery and business operating, and which was arrived at by estimating the value of attainable future profits of a container business to be operated on the real estate?

B. Whether in a condemnation of the entire term of a leasehold the lessee is entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 32, R 248; 567-574), unaccompanied by any evidence of the value of the use, where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term?

C. Whether in condemnation by the United States a lease stipulation (R 561) fixing the amount to be paid to the lessee on sale of the leased premises is inapplicable where the lease contains a condemnation clause which, as

construed below, excludes condemnation by the United States?

D. Whether a condemnation clause in a lease (R 545) which is inclusive of condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" applies to a condemnation by the United States?

REASONS FOR GRANTING THE WRIT

A. In the instant case the Government took the entire fee of Eline's, and the entire leasehold of Gaylord, and hence as the Circuit Court of Appeals purported to recognize the facts differ from those of the General Motors Case. However, the decision of the Circuit Court of Appeals in allowing on the supposed authority of *U. S. v. General Motors,* 65 S. Ct. 357, 89 l. ed. Adv. Op. 379, as a part of just compensation, "ready-to-go" value which is a value over and above the fair market value of the real estate taken, and which is based upon what an alleged purchaser of real estate combined with the machinery and business would be willing to pay in order to go into possession and start production and avoid all delays, expense and inconvenience incidental to getting the machinery and business operating (arrived at by a capitalization of obtainable-future profits) is a decision of a Federal question in a way probably in conflict with the applicable decisions of this Court, particularly those of *Mitchell v. United States,* 267 U. S. 341, *Bothwell v. United States,* 254 U. S. 231 and *United States ex rel T. V. A. v. Powelson,* 319 U. S. 266. Although this Court in the *General Motors Case* denied that it was overruling the long line of decisions relating to consequential damages, the Circuit Court of Appeals in this case has in effect construed the decision in the *General Motors Case* as reversing the rules of consequential damages.

Petitioner has been informed that the government has filed or will shortly file a petition for writ of certiorari to review a decision in *United States of America v. Petty Motors* (CCA 10, March 5, 1945) 147 Fed. (2) 912 in which the tenth circuit has likewise construed this Court's decision in the *General Motors Case,* 65 S Ct. 357, 89 l. ed. Adv. Op. 379, as reversing the rule of consequential damages in leasehold cases.

B. The decision of the Circuit Court of Appeals in allowing a lessee to recover the reproduction cost of improvements and cost of installing machinery, unaccompanied by any evidence of the value of the use (where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term) is in conflict with Carlock v. United States, 53 Fed. (2) 926, 927 (C.C.A. D. of C.) and other decisions, and is an important question of Federal law relating to compensation in condemnation which has not been but should be settled by this Court.

C. The decision of the Circuit Court of Appeals holding that the liquidated damage or sale clause does not limit the compensation recoverable from the United States for the taking of respondent's leasehold seems to involve an important question of Federal law relating to compensation under the Fifth Amendment, payable to a leesee, which has not been but should be settled by this Court.

D. The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meanof the condemnation clause of the lease seems to involve an important question of Federal law which has not been but which should be settled by this Court.

WHEREFORE, this petitioner prays that a writ of certiorari be granted so that this case may be reviewed by this Court; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, May 17, 1945.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The rulings of the District Court, Judge F. Ryan Duffy presiding, made during the trial in respect to the claim of so-called "ready-to-go" value appear on pages R 130-133, 162-163, 163-167, 168, 240, 250-253, 328-332, 531, of the record; in respect of the inapplicability of the sale clause on page 332, 530 of the record; and in respect of the inapplicability of the condemnation clause on page 530 of the record.

The majority and minority opinions of the Circuit Court of Appeals for the Seventh Circuit were field March 5,

1945, and appear at page 637 of the record. They are reported in 148 Fed. (2) Adv. Op. 33.

JURISDICTION

This has already been stated in the petition at page 2, which is hereby adopted and made a part of this brief.

SUMMARY STATEMENT

The essential facts of the case are set forth in the accompaning petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

A. In allowing as part of just compensation where real estate (an entire leasehold) only is condemned by the United States so-called "ready-to-go" value, which is a value over and above the fair market value of the real estate, and which is based upon what an alleged purchaser of the interest in real estate combined with the machinery and business would be willing to pay in order to go into possesion and continue production and avoid all delays, expense, and inconvenience incidental to getting the machinery operating, and which is arrived at by an estimate of the value of attainable future profits of a container business to be operated on the real estate.

B. In holding that a lessee was entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 32, R 248, 567-574) unaccompanied by testimony as to the value of the use, when under the

term of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the remainder of the demised term.

C. In holding that the compensation payable to the respondent by the United States was not limited by the sale clause of the lease.

D. In holding that condemnation by the United States was not within the scope of the condemnation clause.

SUMMARY OF ARGUMENT

POINT A

The Circuit Court of Appeals has construed the decision of this court in the General Motors case, 65 S. Ct. 357, 89 1. ed. 379 as overruling Mitchell v. U. S. 267 U. S. 341, Bothwell v. U. S. 254 U. S. 231, U. S. ex rel T.V.A. v. Powelson, 319 U. S. 266, and long line of cases all to the effect that loss of profits, inconvenience, and consequential damages are not to be compensated for in condemnation.

Gaylord's witnesses fixed the enhancement in the rental value of the leasehold over the amount Gaylord would have had to pay in rent if it had remained on the premises for the unexpired term at $32,843.16 (R 89-92). The total reproduction cost of the improvements added by Gaylord, including the cost of installing the machinery, was $27,-192.12 (Exhibit 32, R 248, 567-574). Assuming the value of the use of the improvements might properly be taken as the total value of such improvements, and cost of installation, the aggregate of such sums and the rental value is $60,035.28. The verdict was for $111,792. (R 538). Thus more than $50,000 is "'ready-to-go" value based upon testimony ascribing a special value to the leasehold by assuming a sale or offering of the lease in combination with the business and equipment of the lessee (which equipment

the lessee was compelled to remove under the lease (R 541)), because the alleged purchaser could immediately produce containers and avoid all delays, expenses and inconvenience incidental to getting the container plant operating. Gaylord has moved its business and has it and all its machinery operating elsewhere. Its only loss, whether characterized as so-called "ready-to-go" value, or good will, is nothing more than that intangible benefit to a business of continuing in its present location and thus avoiding loss of profits, inconvenience and delay, which goes with moving. This court has ruled many times that these losses are not compensable and has re-affirmed this ruling in the General Motors Case, 65 S. Ct. 357, 89 L. ed. 379, 383.

The majority openion of the Circuit Court of Appeals quotes the *General Motors Case* 65 S. Ct. 357, 89 L. ed. 379, and particularly that portion referring to the unusual situation there presented because of the fact that only a portion of the sublease was taken and it was necessary for General Motors to move out and in. The opinion of the Circuit Court of Appeals entirely overlooks the following portions of this Court's decision in the General Motors Case:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, *the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.* No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the

Government. We are not to be taken as departing from the rule they have laid down, which we think sound." (Page 383).

"When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." (page 384) (italics ours).

This court further pointed out (page 384) that the *General Motors Case,* where it was necessary to move out and back as the entire lease was not taken, is entirely different from a situation where the fee or entire lease is taken. In this case the entire fee and entire Gaylord lease was taken. If there is anything in the *General Motors Case* which overrules the long line of authorities of this court that consequential losses are not compensable under the Fifth Amendment, then it is submitted that a question of general importance is presented by the instant case which should be decided by this court. With the possible exception of the General Motors Case as construed in the Eline Case there are no decisions of the Federal Court supporting a so-called "ready-to-go" value or intangible value based on the advantage of avoiding the necessity of moving and interruption of production.

In *Mitchell v. U. S.* 267 U. S. 341, this court denied an owner compensation for the destruction of his business, which resulted from the taking of his land for public project, even though his business could not be re-established elsewhere. See also:

Bothwell v. U. S., 254 U. S. 231 to the same effect. This court had occasion in *U. S. ex rel T.V.A. v. Powelson,*

319 U. S. 266, 281, to review the long line of decisions of this court relating to consequential losses, and there again stated:

> "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. . . . . 'There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.' 267 U. S. p. 345. That which is not 'private property' with-the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the Mitchell Case it need not be reflected in the award due the landowner unless Congress so provides."

This Court further said (page 282) that "going concern value of the enterprise" is only a part of just compensation where business is taken.

In the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383 this court re-affirmed the rule established in the foregoing cases.

Gaylord attributes all the values of the operation of the business to the leasehold and not to the earning power of the machinery, good-will and business management. The machines are set up and operating elsewhere. Gaylord is still in the container business. The fact that Gaylord's business in Milwaukee might have been sold at a profit is not determinative of the value of the leasehold upon which the business is conducted. Certainly there is no warrant for charging Eline's with losses necessary to moving when under the lease Gaylord would have been forced to move at a later date. Whether so-called "ready-to-go" value is applied to a fee taking or leasehold taking it represents the advantage to an owner of continuing in the existing loca-

tion rather than being subjected to the inconvenience of moving. Whatever label is used it is actually a form of recovery for losses and expenses produced by moving. The fact that it is a business loss rather than a value inherent in the real estate is demonstrated by the fact that Gaylord's witnesses as to "ready-to-go" value admitted that if the business was not making money, there would not be a "ready-to-go" value (R 183, 236).

This evidence was received over objection (R 166-168; 177; 183; 217; 227; 287; 289; 291-293). Eline's motion to strike was overruled (R 240, 294, 332). The jury was instructed that the evidence remained in the case (R 531) and was told that if either of such witnesses reached his conclusion as to the value of the leasehold by the capitalization of expected profits, such testimony should be disregarded (R 531).

This instruction taken in connection with the recitation in the charge that these witnesses valued the leasehold on the basis of what another container company would pay for the leasehold with the machinery set up and in place (R 531) invited the jury to base a verdict on this evidence although it was expressly and avowedly based upon a combined sale of leasehold with business and machinery and a capitalization of future potential profits of the plant.

The majority opinion of the Circuit Court of Appeals (R 645) points out that the instructions of the trial court clearly defined the theory of valuation as the difference between the market value of the use for the balance of the term minus rent payable. Eline's has no quarrel with the instruction of the trial court, but the instructions could not cure an award where everything over $60,000 is of necessity based upon so-called "ready-to-go" value. The Circuit Court of Appeals avoided discussing the real issue in the

case—namely, is "ready-to-go" value part of just compensation, but on the basis of the *General Motors Case* held that it was. The majority decision of the Circuit Court of Appeals necessarily holds that "ready-to-go" value may be included as part of just compensation because absent that element of "ready-to-go" value, there is no evidence to support a verdict of more than $60,000.

Eline's entered into an agreement with the Government on the assumption that all the ordinary rules as to limitations of compensable losses applied, but now under the Circuit Court of Appeals decision it has been ruled that such consequential losses are compensable when an entire leasehold is taken. If this decision is a standard for the future, then the same mathematical process can be used on fee property of which the owner is the occupant and upon which he conducts a business. If this decision stands, the United States will be subjected to tremendous claims of a type not heretofore allowable for damages in condemnation cases and all the rules of law laid down by this Court as to limitation of such claims will be circumvented. Indirectly recovery for these losses may be made by using these losses to value a fee or a leasehold, whereas directly they are not compensable under the Fifth Amendment. The effect of such evidence on the cost to the Government of condemning a leasehold is illustrated by a comparison of the award in this case of $111,792 to the Government's appraisal of the Gaylord lease[1] and the undisputed testimony that the value of the building occupied by Gaylord was $112,500 (R 356-359). The total use value of the property for 6 and 2/3 years (about 1/6 of the life of the property)

[1]The Government appraised the Gaylord lease at $40,000, the amount of the sales clause (R. 188). If the Government had appraised the lease on the basis of the present rate "for comparable space" as compared to the rate in the lease, the present rate being "approximately 30 cents a square foot" (R. 188-189; 199-200) the valuation would have been about $24,843.16 (R. 89).

according to the jury's findings would be $111,792 plus the rent of $100,000 or $211,792. In other words, under the jury's findings, the total use value for 1/6 of the life of the property is equal to nearly twice the value of the fee.

POINT B

The decision of Circuit Court of Appeals as to improvements and cost of installing machinery claimed by Lessee is in conflict with other Federal cases, and is an important question of federal law in condemnation which should receive ultimate determination.

Exxhibit 32 (R 248, 567-574) showing reproduction cost of improvements and cost of installing machinery was admitted in evidence over Eline's objection (R 53, 56, 70, 248). Gaylord's own experts admitted they made no attempt to appraise the value of the use of the improvements (R 77, 139, 142). The District Court viewed with doubt the admissibility of this Exhibit 32 (R 52-53, 56, 70, 248, 528, 529).

The Circuit Court of Appeals approved of the admission of this Exhibit 32 because the trial court told the jury to consider it with caution. The jury was therefore allowed to guess as to the use value. The correct instructions by the trial court as to use value could not cure the prejudicial admission of this Exhibit 32, without testimony as to the value of the use.

The decisions all hold that under lease provisions such as in this case the lessee is entitled to only use value as a part of just compensation.

Carlock v. U. S. 53 Fed. (2) 926, 927 (CCA D.C.).
U. S. v. Certain Parcels of Land, 54 Fed. Supp. 561, 562.
Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746.

Fiorini v. Kenosha, 208 Wis. 496, 243 N. W. 761.

If this decision of the Circuit Court is to stand, when the Government condemns an entire leasehold, it will have to pay the reproduction cost of the improvements and the cost of installing machinery by a lessee, because the lessee will claim the entire cost and ignore proving the use value of the improvements during the balance of the term of the lease.

The cost of installing machinery ($9,992.60) is not compensable because it is an item of consequential damage where the entire lease is taken under decisions cited in prior argument.

POINT C

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

The sales clause in the lease provides:

> "77. It is further understood and agreed by and between the parties hereto that in the event of a sale of the within leased premises or of the Eline plant property or a portion thereof (of which the within leased premises are a part), lessor reserves and has the right to cancel and terminate this lease to take effect at any time after December 31, 1941, by lessor giving to lessee not less than six months' written notice of such intention so to cancel and terminate. . . ." (R 561).

On the day the petition for condemnation was filed, the District Court entered an order of immediate possession of the unoccupied portion of said premises, and also gave possession of the occupied portion as of April 30, 1942 (R 7). Gaylord was given prompt notice of the condemnation (R 307, 308, 589). On June 16, 1942, Eline's gave the

United States, at its request, a written option to purchase the property pursuant to 50 U.S.C.A. 171. This option was accepted by the Government on August 1, 1942 (R 590-597). The option provided that if the Government did not desire to take title by deed, it might file a declaration of taking, the price in the option in that case to control.

A long line of cases have held that a condemnation is a sale.

American Creameries v. Armour, 149 Wash. 690, 271 Pac. 896.

United States v. Certain Parcels of Land, 51 Fed. Supp. 811.

Vandermulen v. Vandermulen, 108 N.Y. 195, 15 N. E. 383.

Atlanta, Knoxville & Northern R. R. v. So. Ry. Co. (CCA) 131 Fed. 657.

Jackson v. State, 213 N. Y. 34, 106 N. E. 751.

Bell Telephone v. Parker, 187 N. Y. 299, 79 N. E. 1008.

The majority opinion of the Circuit Court of Appeals holds that because the parties failed in the condemnation clause to expressly name the United States, condemnation by the United States could not be a sale within the terms of the sales clause. If the condemnation clause was limited as claimed by the majority opinion, it performs no functions in the case and the sales clause is to be construed as if the condemnation clause were excised from the lease. The two provisions were complementary and meant to exhaustively cover the lessee's interest in the property. There is no conflict or inter-relationship between the condemnation clause and the sales clause. Both may stand without either impinging on the other.

A number of the decisions have held that the option agreement used in this case created a binding vendor-vendee relationship between the government and the property owner.

U. S. v. Scott, 140 Fed. (2) 941 (CCA 8).

Wachovia Bank and Trust Company v. U. S. 98 Fed. (2) 609 (CCA 4).

U. S. v 3.25 *Acres of Land,* 53 Fed. Supp. 884.

In Danforth v. U. S. 308 U. S. 271, 282, this court, speaking of this type of option said:

> "We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioners' interest in land subject to perfecting the title through condemnation."

POINT D

The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause involves an important question of federal law which should receive ultimate determination.

The condemnation clause (Clause 13) provides:

> "Lessee further agrees that if at any time during the term of this lease the said premises or any part thereof shall be acquired or condemned and/or purchased by any municipality or political subdivision of the state wherein said premises are located, or by any company or corporaton lawfully qualified to exercise the right of eminent domain, the lessor shall have the right to cancel and terminate this lease by giving the sellee not less than 30 days written notice of such intention to cancel * * * *" (R 545).

A long line of cases hold that the United States is a corporation.

U. S. v. Maurice, 109 Fed. Case 15, 747, 2 Brock U. S. 96.

Helvering v. British, American Tobacco Co. 69 Fed (2) 528, 530.

Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 92.

Respublica v. Sweers, 1 U. S. 41, 1 Dall. 41.

Cotton v. U. S., 11 Haw. 229, 231.

Stanley v. Schwalby, 147 U. S. 508, 517.

The decision of the Circuit Court of Appeals to the effect that the United States is not a corporation within the terms of the clause is based principally on *U. S. v. Cooper,* 312 *U.* S. 600. An analysis of the *Cooper Case* and later decisions of the court show that this case does not so hold. The *Cooper Case* involved the construction of the word "person" defined in the Sherman Act as follows:

> "The word 'person or persons' whenever used * * * shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the Laws of any of the territories, the laws of any state or the laws of any foreign country."

All the court held was that under this definition the United States could not be treated as a corporation organized under its own laws and could not exist under itself. (In Clause 13 the word "corporation" is not qualified as in the above definition.) The majority opinion of this court does not deny the corporate status of the Unted States but merely holds that it is not within the class of corporations to whom the benefits of the act were intended to be extended.

This Court had occasion recently in the case of *Parker v. Brown,* 317 U. S. 341, 87 L. ed. 235, 241 to consider the *Cooper Case* in this respect and said:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

> The act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, Georgia v. Evans, 316 U. S. 158, 86 L ed. 1346, 62 S.Ct. 912, but the United States may not, United States v. Cooper Corp. 312 U. S. 600, 85 L. ed. 1071, 61 Sup. Ct. 742—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

In recent case of *State of California v. U. S.*, 320 U. S. 577, 585 this court held that the State of California fell within the term "person" which is defined as "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or Possession thereof or of any foreign country." (46 U. S. C. A. 801). This court pointed out that a different construction "would have such dislocating consequences."

Under the position taken by the Circuit Court of Appeals condemnation exercised through any corporation created either by the United States or the State of Wisconsin would fall within the clause, while a condemnation which was carried on directly by the United States or the State of Wisconsin rather than by a delegated agency or instrumentality would not fall within the clause.

Respectfully submitted,

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JUN 13
CHARLES ELMOR

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1302

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

GAYLORD CONTAINER CORPORATION,
Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Inaccuracies in Petition for Certiorari.

In an attempt to dress up this case for the purpose of securing a writ of certiorari, the Petitioner is guilty of a number of serious misstatements.

1. Thus the Petitioner with much repetition throughout its brief, endeavors to make it appear that the trial court admitted testimony of loss of good-will, damage to the lessse's business, or loss of future business profits.

Actually the trial court scrupulously excluded any such evidence and carefully charged the jury on the correct measure of compensation, adding as follows: (R. 529)

> "You are not permitted to make an allowance for damages to personal property of the tenant or the expense of removing the same, nor for any loss of profits, nor for expenditures to secure a new location, or any higher rent which may be there paid, nor are you to consider a lower rent that may have been paid, nor are you permitted to allow for expenditures to prevent a loss of trade, nor for the inconvenience or interruption of business suffered by the necessity of moving. Neither is the loss of goodwill a proper element of damage, nor losses in the business because of the necessity of giving up conveniences that the tenant may have enjoyed on the premises which were condemned. None of these are recoverable."

2. Petitioner states (P. 8-9) that Gaylord received compensation for "ready-to-go value over and above the fair market value of the leasehold." This is *not* the fact. Gaylord's evidence of value was presented by proof of what many concerns in the Paperboard Industry would be willing to pay for the opportunity of taking over Gaylord's leasehold, entirely exclusive of Gaylord's business and organization, but assuming the obligations of the lease (R. 169, 218-219). From this amount the witnesses deducted the value of the machinery and equipment which Gaylord was permitted to remove after condemnation (R. 166-8, 236-7). Their estimates of value expressly excluded from consideration the business organization of Gaylord, its good-will, profits and other assets (R. 163, 167). The evidence introduced and received by the trial court was restricted to proof of *the market value* of Gaylord's leasehold at the date of condemnation.

3. Petitioner is in error in saying (P. 8) that the evidence of cost of improvements and installations was "unaccompanied by any evidence of the value of the use." There was abundant evidence that such costs were incurred by Gaylord, prudently and wisely, and that they enhanced the market value of the leasehold by at least the amount expended, less amortization (R. 80-81, 95, 249-50).

The foregoing instances are only examples of the way in which the facts and issues of this case have been colored and distorted in an effort to persuade this court to grant certiorari. It would unduly expand the size of this brief to point out each misstatement in the Petition.

Chief Reason Urged by Petitioner for Granting Petition.

The chief reason urged by Petitioner for granting the Petition is apparently that the Seventh Circuit Court of Appeals has in some way misapplied this court's decision in *United States vs. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357. (P. 9)

The Circuit Court of Appeals made a thorough examination of the evidence and the trial judge's instructions to the jury, and made this observation regarding the connection between this and the *General Motors Case*, (R. 645-6):

> "The Court was trying this case for the second time and devoted much care and patience to the end that the jury might have the correct measure of damages in its deliberations. We think the Court properly instructed the jury and evidenced considerable perspicuity in determining the correct measure of damages in view of the then holding of our Court in the General Motors case and the holding of the

> Supreme Court yet to come. The instant case is not completely parallel with the General Motors case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied."

The General Motors decision has but little application to this case. There, only the temporary use of leased premises was involved. Here we are concerned with compensation for an entire leasehold. The trial judge recognized the difference when he told the parties at the outset of the trial (See R. 71 in Case No. 1303, Lakeside Laboratories, Inc. vs. Eline's Inc., companion case tried just before this case):

> "The Court: If you think that the General Motors case would justify, for instance, your moving expenses, I am going to rule that it will not. I will tell you that ahead of time. You can make your offer if you want to."

The plaintiff (respondent) accordingly made no attempt to prove damages resulting from moving or similar expenses, but restricted its proof to the time-honored principle of showing the market value of the leasehold that was condemned.

Thus the trial court did not apply the rule of damages established in the General Motors case, and the Circuit Court of Appeals recognized that the two cases were not parallel. How, then, can the Petitioner say that the Circuit Court of Appeals has misconstrued this court's decision in that case? The fact is that the court below was not called upon to construe it, because the trial court did not apply the rules of compensation laid down in the General Motors case. The Petitioner was entirely successful in persuading the trial court that the General

Motors case did not apply. It comes with a bad grace for Petitioner now to claim that the trial court applied the principles of the General Motors case and that it was improper to do so.

Reasons for Granting Writ do not Exist.

The Plaintiff's (Respondent's) evidence of value followed the well established rule in condemnation cases that the condemnee is entitled to recover the fair market value of his property interest, for its highest and best use.

Olson v. U. S., 292 U.S. 246, 255-7.

It was undisputed that the highest and best use of the physical premises (the improved leasehold) was for a manufacturing plant, such as a corrugating paper plant (R. 208-9). The witnesses testified to its value for that purpose, and expressed opinions as to what that value would be in terms of a use of the premises for the balance of the lease (R. 167, 217). From this was deducted the value of the machinery and equipment which the government permitted the tenant to remove (R. 167, 218). The balance was submitted to the jury as the value of the property interest of which the tenant was deprived by the condemnation. Evidence of the amounts expended by the tenant in improving the leasehold premises was introduced, not as additional and separate items of compensation, but as evidence of the extent to which the tenant had enhanced the market value of the leasehold (R. 248-250). All evidence of past and future anticipated profits of Gaylord's business, good-will, and expense of moving, were expressly excluded from the jury (See Court's Instructions R. 531-2). Counsel for Gaylord stated to the jury that no claim was made for such items and the court so charged the jury (R. 515, 529).

Petitioner now attempts to distort this evidence to make it appear that it represents the same thing as compensation for "business" losses, and other consequential elements of damage, held non-compensable by such decisions as *Mitchell vs. U. S.*, 267 U.S. 341. By so doing Petitioner hopes to make it appear that the Seventh Circuit Court of Appeals in this case is extending the the doctrine of the General Motors case to the situation where an entire leasehold is condemned, and not just a portion of it. Thus Petitioner commits two grave errors. It misstates the character of evidence introduced, and it misstates what the Seventh Circuit held in this case.

Petitioner complains that the tenant's experts were permitted to testify that Gaylord's highly improved leasehold would bring a substantial premium on the market as of July 1, 1942. These witnesses pointed out that having the leasehold space, integrated with the machinery and other improvements, would permit a purchaser of the improved leasehold to start at once a profitable operation, which could not be done by a purchaser buying an empty leasehold in one place, the improvements in another, and having to spend a long time combining them (R. 160, 214). It was altogether sensible that plaintiff's witnesses took into account that the improved leasehold would be immediately productive of profit to a purchaser, and that they valued the leasehold on an assembled basis rather than as broken up or disassembled into its component parts. An improved and special type of property must obviously be valued by considering its productivity to a purchaser. That is what it is bought for. Acreage, front foot or square foot values are in such cases no more applicable than they would be in valuing an oilwell.

On this point we cite: *Brooklyn Eastern District Terminal vs. City of New York,* 139 Fed. (2d) 1007, (CCA 2); Cert. Den. 322 U.S. 747.

> "The settled rule is that the owner's loss, not the taker's gain, measures the compensation to be awarded, Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 54 L.Ed. 725; United States ex rel, T.V.A. v. Powelson, supra, 319 U.S. at page 281, 63 S.Ct. 1047, 87 L.Ed. 1390; but the 'concept of market value' sets the 'practical standard.' United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 280; Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236. Here we have an interest not bought and sold in the market and sale value must be somewhat hypothetical, though probably not unusually so as condemnation values go. See In re Public Beach, Borough of Queens, supra, 269 N.Y. at page 76, 199 N.E. 5; United States ex rel. T.V.A. v. Powelson, 4 Cir., 138 F. 2d 343, 345; Hale, Value to the Taker in Condemnation Cases, 31 Col. L. Rev. 1, 13. Loss of business profits as such is not allowable, Mitchell v. United States, 267 U.S. 341, 345, 45 S.Ct. 293, 69 L.Ed. 644; but in default of more direct evidence of sale value, present value (i.e., as of the time of taking) of clearly to-be-expected future earnings may be considered. See Sanitary District v. Pittsburgh, Ft. W. & C.R. Co., 216 Ill. 575, 584-586, 75 N.E. 248; James Poultry Co. v. Nebraska City, 136 Neb. 456, 286 N.W. 337; and cf. In re Sixth Ave. Elevated R. R. 265 App. Div. 200, 38 N.Y.S. 2d, 730, 737; 40 Yale L.F. 779, 781."

The Seventh Circuit Court of Appeals was unanimous in sustaining the trial court on this issue of the measure of damages and the admissibility of evidence submitted by the tenant to show the market value of the leasehold. It specifically stated that the trial court had shown "con-

siderable perspicuity in determining the correct measure of damages" (R. 645).

As the opinion of the Seventh Circuit Court of Appeals demonstrates, the principal issues in this case involved the construction to be given to certain provisions of a rather unusual lease (R. 639). The Circuit Court sustained the trial court's construction of these provisions. We fail to see how such a decision is at variance with the decisions of this court, or how such issues present important questions of general interest and concern. Both the District Court and the Circuit Court of Appeals applied well-established rules of contract construction in interpreting these disputed provisions of the lease. Even the dissenting opinion in the Circuit Court of Appeals, which disagreed with the majority opinion only with respect to the construction of two of the provisions in the lease, stated great reluctance in expressing any dissent due to "the reasons very persuasively expressed in the majority opinion". We submit that the majority construction is a sound one and in any event is not at variance with any decision of this court. Likewise, we cannot believe that a construction of the various clauses of this lease in a controversy between two private parties presents any important question of federal law requiring the consideration of this court.

In 1942, Petitioner Eline's, received (by deposit in the Registry of the Court) the sum of $2,290,000 from the United States Government for the group of buildings known as the old Eline Chocolate Plant in Milwaukee and on condition that from this amount the tenants should receive their just compensation (R. 9). Eline's has been dissatisfied with every award for the tenant Gaylord, which has so far been rendered in this

case, including an award by three commissioners and two separate jury verdicts (R. 12, 23, 606). In its determination to make the tenants go "all the way" for their compensation, Eline's misstates the proof and distorts the issues below. The record in this case will substantiate, however, that there is no merit to the charge that the valuation of Gaylord's leasehold in the trial court included anything for Gaylord's business, loss of profits, damage to good-will, expense of moving, or other consequential damages.

The Petition for Writ of Certiorari should be denied.

Dated: June 11, 1945

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1302

ELINE'S INC., PETITIONER

v.

GAYLORD CONTAINER CORPORATION

No. 1303

ELINE'S INC., PETITIONER

v.

LAKESIDE LABORATORIES, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These two cases arise out of condemnation proceedings instituted by the United States to acquire the fee simple title to certain lands in Milwaukee, Wisconsin. Approximately 91 acres of the land taken was owned by petitioner Eline's,

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Inc., and was improved by industrial buildings. Portions of the property were occupied by Lakeside Laboratories, Inc., and Gaylord Container Corporation under leases from Eline's, Inc. The United States agreed with Eline's as to the amount of compensation to be paid for the entire property and paid the agreed sum, $2,290,000, into court. This payment discharged the obligation of the United States, and the United States has no pecuniary interest in proceedings for distribution of the fund between the various claimants.[1]

Nevertheless, although the United States did not participate in either the trials or the appeals of these proceedings between claimants to the fund, the United States is directly interested in the validity of certain of the propositions of law deemed by the lower courts to be controlling, and presented for the consideration of this Court in the petitions for writs of certiorari. The controversy in each case is between the fee owner of the land and a tenant, as to the proper measure by which to determine the amount to which the tenant was entitled out of the sum paid by the United States for the fee. The court below rejected contentions of the fee owner that this

[1] *United States* v. *Dunnington*, 146 U. S. 338, 351; *Eline's, Inc.* v. *Town of Milwaukee, Wis., et al.*, 135 F. 2d 878 (C. C. A. 7). Indeed, the United States was not even entitled to notice of such proceedings. *United States* v. *Certain Lands in Town of Hempstead, Nassau County, New York*, 129 F. 2d 918 (C. C. A. 2).

amount was controlled by certain lease provisions;[2] and it plainly regarded the cases as governed by the same criteria as would have been applicable if the controversy had been between the tenant and the United States. This appears from the court's express reliance in its opinions on the decision of this Court in *United States* v. *General Motors Corporation,* 323 U. S. 373—a decision which, of course, dealt directly and exclusively with the liability of the United States upon condemnation of a leasehold.[3] Accordingly, there is likelihood that the rulings below will be urged as precedents to the disadvantage of the United States in future litigation to which it may be a party.

In the *General Motors* case, this Court said (323 U. S. at 379):

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[2] The petitions for writs of certiorari seek to present the questions whether a lease provision for termination of the lease upon condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" was effective upon condemnation by the United States, and, if not, whether the condemnation brought into play a separate provision for liquidated damages upon sale of the property. The United States does not desire to take any position on these questions, at least at this stage of the litigation, and this memorandum is not concerned therewith.

[3] That the trial court followed the same view appears from the fact that the judge, in ruling on the admissibility of evidence and in instructions to the jury, repeatedly pointed out that the United States had not taken either the machinery or the business, and that the value of the leasehold alone was therefore at issue (No. 1302: R. 87, 163, 205, 492, 529; No. 1303: R. 55, 174, 375, 408).

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * We are not to be taken as departing from the rule they have laid down, which we think sound.

In the instant cases, the United States took the fee. Nevertheless, the circuit court of appeals sustained the method of valuation employed at the trial, saying:

> The instant case is not completely parallel with the *General Motors* case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied.

We construe the *General Motors* decision as being inapplicable where, as here, the United States condemns a fee title, as well as where the United States condemns for a period of time longer than the term of existing leases. We deem it important that the limitations of the *General Motors* decision be made clear to the lower courts, in order that the doctrine of that case be not misapplied to the detriment of the Government. To this end the

United States has filed a petition for writs of certiorari (Oct. Term 1944, Nos. 1272–1278) to review the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Petty Motor Company,* et al., 147 F. 2d 912, where, it is believed, the *General Motors* decision was misapplied to sustain the admission of evidence of removal costs and consequential damages in the valuation of the rights of tenants whose terms were of shorter duration than that taken by the Government. The instant cases, it is believed, involve a comparable misapplication of the doctrine of the *General Motors* case, and present equally cogent grounds for the issuance of the writs of certiorari prayed by the petitioner. If the writs are granted, the United States proposes to participate in the cases on certiorari because of the importance of determining the correct application of the *General Motors* decision.

Respectfully submitted.

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